Kumpulan A Besik Sdn Bhd v Araman Jaya Sdn Bhd

HIGH COURT (SHAH ALAM) — WRIT SUMMONS NO MTL(3)–22–474 OF 2000
NIK HASMAT JC
25 OCTOBER 2010

Contract — Agreement — Breach — Resolutions passed to appoint plaintiff to develop and manage project to be awarded to defendant — Plaintiff executed preparatory works in anticipation of project — Whether resolutions intended to be legally binding — Whether defendant in breach — Whether plaintiff proven claim for expenditure and costs incurred in respect of project

Evidence — Witness — Failure to call witnesses — Whether defendant's failure to secure attendance of its vital witnesses without reason fatal — Whether adverse inference under s 114(g) of the Evidence Act 1950 ought to be invoked against defendant — Evidence Act 1950 s 114(g)

The Selangor State Government ('the SSG') awarded to the defendant a project for the privatisation of a wholesale market and cinema at Bandar Seri Kembangan, Selangor ('the project'). The project was approved and awarded to the defendant by way of a privatisation agreement ('the agreement') dated 8 November 1997. The plaintiff alleged that prior to the execution of the agreement, the defendant had passed a company resolution to appoint the plaintiff to develop and manage the project and that the plaintiff, by way of a company resolution, had also agreed to accept the contract from the defendant, once the latter was awarded the project. The plaintiff further claimed that pursuant to the parties' understanding, the plaintiff had initiated and executed preparatory works in anticipation of the project and had incurred considerable costs and expenses in the execution of these preparatory works for the project. However, despite being subsequently awarded the project, the defendant had failed and or refused to appoint the plaintiff to manage the project. The plaintiff thus commenced the present action against the defendant for its failure to comply with the agreed resolutions of the parties, which were intended to be legally binding. By way of this action the plaintiff sought to claim against the defendant for all costs and expenses incurred by the plaintiff to develop and manage the project for the defendant amounting to RM3,842,109.45, damages for loss of profit due to the defendant's refusal and failure to comply with the agreed resolution of the parties, interest and costs. It was the defendant's contention that the parties' resolutions were vague and that the project that was awarded to the defendant by the SSG was materially different from the project that was agreed to by the parties. The defendant

further contended that the parties' company resolutions were not intended to be legally binding and were subjected to the execution of a further formal contract between the parties. The issues to be considered in this case were whether the resolutions agreed to by both parties were legally binding and constituted a valid and enforceable contract and, if so, whether the plaintiff had proven its claim for expenditure and costs incurred for the project.

Held, allowing the plaintiff's claim with costs:

(1) Based on the clear content of the parties' resolutions and having considered the background and surrounding circumstances against which the resolutions were passed, it was found that that the parties had intended to create a legal relation in anticipation of an award of a financially rewarding project from the SSG to the defendant. Therefore, for all intents and purposes, the resolutions, which were simultaneously passed by both parties on 16 March 1993, that were clearly supported by consideration were legally binding and enforceable against the defendant. Further, it was the unchallenged evidence of the plaintiffs' witnesses that prior to the passing of both the directors' resolutions, a preparatory meeting was held for the plaintiff's and defendant's directors at the Park Royal Hotel in 1993 to discuss the project (see paras 13 & 15).

(2) The defendant's failure to dispute the plaintiff's assertion during the cross-examination of the plaintiff's witnesses and the defendant's failure to secure the attendance of its vital witnesses without reason was found to be fatal to its case and for this reason the adverse inference under s 114(g) of the Evidence Act 1950 was invoked against the defendant. In the absence of rebuttal evidence from the defendant, the court was of the view that the project awarded by the SSG to the defendant was the same project as was referred in both the plaintiff's and defendant's company resolutions (see paras 19 & 32).

(3) The plaintiff had duly proven its claim against the defendant that in developing and managing the said project for the defendant, the plaintiff had incurred expenditure and costs including payment of professional consultancy fees, remuneration to the defendant's directors, office rental and renovation costs and other related expenses. The appointment and involvement of other professionals in the preparatory works for the project was also evident in the documents produced in court by the plaintiff. The evidence adduced in its entirety, proved that the defendant had breached the parties understanding which had occasioned severe financial losses to the plaintiff (see paras 20, 25 & 36).

(4) The court considered damages in the amount of RM2.5m awarded to the plaintiff to be a fair and reasonable amount in the light of the documentary and oral testimony of the witnesses (see para 37).

[Bahasa Malaysia summary

Kerajaan Negeri Selangor ('KNS') menyerahkan kepada defendan satu projek untuk penswastaan pasar raya borong dan pawagam di Bandar Seri Kembangan, Selangor ('projek tersebut'). Projek tersebut telah diluluskan dan diberikan kepada defendan menerusi perjanjian penswastaan ('perjanjian tersebut') bertarikh 8 November 1997. Plaintif mendakwa bahawa sebelum penyempurnaan perjanjian tersebut, defendan telah meluluskan resolusi syarikat untuk melantik plaintif untuk membangun dan mengurus projek tersebut dan bahawa plaintif, menerusi resolusi syarikat, juga bersetuju menerima kontrak tersebut daripada defendan, sejurus defendan diberikan projek tersebut. Plaintif selanjutnya mendakwa bahawa berikutan persefahaman antara pihak-pihak, plaintif telah memulakan dan melaksanakan kerja-kerja persediaan dalam mengharapkan projek tersebut dan telah menanggung kos dan perbelanjaan yang agak banyak dalam membuat kerja-kerja persediaan bagi projek tersebut. Walau bagaimanapun, setelah diberikan projek tersebut, defendan gagal dan/atau enggan melantik plaintif untuk menguruskan projek tersebut. Oleh itu plaintif memulakan tindakan ini terhadap defendan atas kegagalannya mematuhi resolusi-resolusi yang telah dipersetujui pihak-pihak, yang mana bertujuan mengikat secara undang-undang. Menerusi tindakan ini, plaintif memohon untuk menuntut terhadap defendan semua kos dan perbelanjaan yang telah ditanggung oleh plaintif untuk memaju dan mengurus projek tersebut bagi defendan berjumlah RM3,842,109.45, ganti rugi kehilangan keuntungan akibat keengganan defendan dan kegagalan mematuhi resolusi yang telah dipersetujui pihak-pihak, faedah dan kos. Menjadi hujahan defendan bahawa resolusi-resolusi plaintif adalah tidak jelas dan projek yang diberikan kepada defendan oleh KNS adalah berbeza secara materialnya daripada projek yang dipersetujui pihak-pihak. Defendan seterusnya berhujah bahawa resolusi-resolusi syarikat pihak-pihak tidak bermaksud menjadi terikat secara undang-undang dan tertakluk kepada penyempurnaan kontrak rasmi selanjutnya antara pihak-pihak. Isu-isu untuk dipertimbangkan dalam kes ini adalah sama ada resolusi-resolusi yang dipersetujui kedua-dua pihak adalah terikat secara undang-undang dan merupakan kontrak yang sah dan boleh laksana, dan jika sedemikian, sama ada plaintif telah membuktikan tuntutannya untuk perbelanjaan dan kos yang ditanggung bagi projek tersebut.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Berdasarkan isi kandungan resolusi-resolusi pihak-pihak yang jelas dan mengambilkira latarbelakang dan keadaan sekeliling resolusi-resolusi tersebut diluluskan, didapati bahawa pihak-pihak berniat untuk mewujudkan hubungan sah dalam mengharapkan pemberian projek yang lumayan daripada KNS kepada defendan. Oleh itu, dengan niat dan tujuan, resolusi-resolusi tersebut, yang mana diluluskan serentak

oleh kedua-dua pihak pada 16 Mac 1993, yang mana jelas disokong oleh balasan, adalah secara undang-undang mengikat dan berkuat kuasa terhadap defendan. Selanjutnya, adalah menjadi keterangan saksi-saksi plaintif yang tidak dapat dipatahkan bahawa sebelum kelulusan kedua-dua resolusi pengarah-pengarah, suatu mesyuarat persediaan diadakan bagi pengarah-pengarah plaintif dan defendan di Hotel Park Royal 1993 bagi membincangkan projek tersebut (lihat perenggan 13 & 15).

(2) Kegagalan defendan untuk mempertikaikan penegasan plaintif semasa pemeriksaan balas saksi-saksi plaintif dan kegagalan defendan menjamin kehadiran saksi-saksi pentingnya tanpa alasan adalah sangat memudaratkan kesnya dan disebabkan ini, inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 terpakai terhadap defendan. Dalam ketiadaan keterangan pematahan daripada defendan, mahkamah berpendapat bahawa projek yang diberikan oleh KNS kepada defendan adalah projek yang sama yang dirujuk kedua-dua resolusi-resolusi syarikat plaintif dan defendan (lihat perenggan 19 & 32).

(3) Plaintif telah membuktikan tuntutannya terhadap defendan bahawa dalam membangun dan mengurus projek tersebut bagi defendan, plaintif telah menanggung perbelanjaan dan kos termasuklah bayaran yuran pakar runding, gaji kepada pengarah-pengarah defendan, sewa pejabat dan kos pengubahsuaian dan lain-lain perbelanjaan yang berkaitan. Perlantikan dan penglibatan profesional lain dalam kerja-kerja persediaan bagi projek tersebut juga ketara dalam dokumen-dokumen yang dikemukakan di mahkamah oleh plaintif. Keterangan yang dikemukakan dalam keseluruhannya menunjukkan bahawa defendan telah melanggar persefahaman pihak-pihak yang mana mengakibatkan kerugian kewangan yang teruk kepada plaintif (lihat perenggan 20, 25 & 36).

(4) Mahkamah mempertimbangkan ganti rugi sejumlah RM2.5 juta yang diberikan kepada plaintif adalah adil dan wajar melihat kepada keterangan dokumentar dan saksi-saksi (lihat perenggan 37).]

Notes

For cases on breach of agreement, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2566–2823.

For cases on failure to call witness, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2822–2830.

Cases referred to

Chu Kim Sing & Anor v Abd Razak bin Amin [1999] 6 MLJ 433; [1999] 4 AMR 4198, HC (refd)

Ng Hong Chai v Teok Ah Kow [2000] 5 CLJ 175, CA (refd)

Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697, HC (refd)

Legislation referred to

Evidence Act 1950 ss 101, 102, 103, 114(g)

Mohaji bin Selamat (The Law Practice of Mohaji & Hazury) for the plaintiff. Jasbeer Singh (Jasbeer, Nur & Lee) for the defendant.

Nik Hasmat JC:

BACKGROUND FACTS

[1] The plaintiff's claim against the defendant was based on a privatisation development agreement executed between the Selangor State Government and the defendant for a privatised development project on Lot PT 11050, Lot PT 11051, Lot 5740, Lot 5270, Lot 1925, Lot 5744 and Lot 5743, Mukim Petaling, Seri Kembangan, Selangor Darul Ehsan. Prior to the execution of the agreement, the defendant had passed a company resolution to appoint the plaintiff to develop, manage and handover the privatisation project of wholesale market and cinema at Bandar Seri Kembangan, Selangor Darul Ehsan, and the plaintiff, by way of a company resolution had also agreed to accept the contract from the defendant. Pursuant to the parties' understanding, the plaintiff initiated and executed prepatory works in anticipation of the project and had incurred considerable costs and expenses in the execution of these prepatory works for the project. Despite being subsequently awarded the privatised project by the Selangor State Government, the defendant had failed and or refuse to appoint the plaintiff to the project.

THE PLAINTIFF'S CLAIM

[2] The plaintiff's claim against the defendant is for all costs and expenses incurred by the plaintiff to develop and manage the privatised development project for the defendant amounting to RM3,842,109.45. The plaintiff is further claiming for damages for loss of profit due to the defendant's refusal and failure to comply with the agreed resolution of the parties, interest at the rate of 8%pa on the judgment sum from the date of filing of the writ until full and final settlement and costs. With regard to the plaintiff's claim in para 10(a) of the writ summons, at the onset of the hearing on 4 December 2009, the plaintiff's counsel had applied orally to the court to withdraw their claim in para 10(a) of the plaintiff's statement of claim which was allowed by this court.

JUDGMENT

[3] The plaintiff succeeded to prove their claim against the defendant on a balance of probability, and accordingly, the plaintiff's claim in paras 10(b), (c),

(d) is hereby allowed for an amount of RM2.5m with interests and costs.

ISSUES

(a) Whether by way of the directors resolutions passed by the plaintiff and the defendant, the defendant had agreed to appoint the plaintiff to develop and manage the privatisation development project of wholesale market and cinema at Bandar Seri Kembangan, Selangor situated on the land Lot PT 11050, Lot PT 11051, Lot 5740, Lot 5270, Lot 1925, Lot 5744 and Lot 5743, Mukim Petaling, Seri Kembangan, Selangor ('the said privatised project') and whether the parties directors resolutions were valid and enforceable; and

(b) Whether the plaintiff succeeded to prove their claim against the defendant for the amount of RM3,842,109.45 being the cost and expenses incurred by the plaintiff in developing and managing the said privatised project for the defendant.

THE COURT'S FINDINGS

[4] The company resolutions of the plaintiff and the defendant which had authorised the appointment of the plaintiff to develop and manage the privatised project for the defendant constitute a valid and enforceable contract. The parties' resolutions dated 16 March 1993 in exhs P2, P3, P37 and P38 clearly contained parties intent and understanding, namely the defendant's appointment of the plaintiff and the plaintiff's acceptance of the appointment to develop the privatised project for the defendant. Although, the defendant's resolution stated that the understanding is made 'subject to the terms and conditions as stated in the agreement', based on the conduct of the parties and the surrounding circumstances alluding the passing of the agreed resolutions, it is clear that the defendant had clearly intended to appoint the plaintiff to develop the privatised project for the defendant upon the terms to be stated in an agreement.

[5] Both parties had discussed the 'said privatised project' in a prepatory meeting held at Royal Park Hotel prior to the passing of the parties company resolution, and the parties understanding with regard to the project was further negotiated and developed during the thirty two prepatory meetings held between their respective representatives during the period from 11 September 1996 to 15 May 1997. The meetings were attended by the plaintiff's managing director, PW1, the defendant's authorised representative and director, Mazlin bin Aris and the consultants engaged by the plaintiff for the project. The meetings were specifically held for the purpose of the said privatised project which was evident from the comprehensive minutes in respect of the progressive works for the said privatised project and pursuant to the prepatory

works discussed and executed at these meetings, the project was ultimately awarded by the Selangor State Government to the defendant subject to the terms and conditions specified in the official correspondences of Petaling District Council in exh P7, and the Selangor State Secretary in exh P40 dated respectively 17 May 1995 and 7 August 1995.

[6] The plaintiff had succeeded to prove that pursuant to the plaintiff's execution of the relevant prepatory works, the defendant had obtained and secured the approval for the said privatised project from the Selangor State Government. Based on the project paper and working proposal which was prepared and developed for the project by the plaintiff and the consultants engaged for the project, the defendant had obtained and secured approval for the privatised project as early as 28 February 1995 as exhibited in P6.

[7] The plaintiff have further proved that all the expenses and costs incurred by the plaintiff was for the preparation and development of the said privatised project for the defendant as was agreed by both parties in their respective resolutions. In this regard, a privatisation development agreement was subsequently signed between the defendant and the Selangor State Government on 6 November 1997 barely six months after the parties' last meeting on 15 May 1997.

GROUNDS OF JUDGMENT

Issue 1

Whether the parties agreed resolutions were legally binding and constitute a valid and enforceable contract

[8] It is an established legal principle that he who alleges, must prove the allegation and the onus is on the defendant to discharge such proof. During the court proceedings on 4 December 2009, 28 December 2009, 29 December 2009, 5 January 2010, 28 January 2010, 1 February 2010, 24 February 2010, 25 February 2010, 12 March 2010, 22 March 2010, 29 March 2010, 12 April 2010, 26 April 2010 and 30 April 2010, the plaintiff had produced six witnesses to support their claim that through their respective directors' resolutions, both parties had entered into a legal relationship for the purpose of securing the privatised project for the defendant and that the agreed resolution constitute a valid and enforceable contract. For the purpose of civil proceedings, the legal burden to establish the claim under ss 101, 102 and 103 of the Evidence Act 1950 is clearly on the plaintiff. In the case of *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697, Augustine Paul JC held:

> It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party. When the burden shifts to the other party, it can be discharged by cross examination of witnesses of the party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods …

[9] In determining whether or not parties had intended to enter into a legal relation and whether the parties resolution is legally binding and enforceable, reference is made to the case of *Ng Hong Chai v Teok Ah Kow* [2000] 5 CLJ 175, where Justice Malik Ishak held:

> Now, there are two types of contract, formal or informal. Formal contracts may be reduced in writing while others are said to be informal. To constitute a valid contract, there must be separate and definite parties thereto; those parties must be in agreement, that there must be consensus ad idem; those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises and the promises of each party must be supported by consideration.

[10] In this regard, it is the court's finding that the plaintiff's and the defendant's board of director's resolutions at exhs P2, P3, P37 and P38 dated 16 March 1993 contained parties' clear understanding and intention to enter into legal relation where contractual assurances were respectively made for the purpose of the said privatised project. The contractual promises made by both parties in the resolutions were mutually and financially beneficial to the parties and were clearly supported by consideration. The defendant's resolution as exhibited in P2 and P37 clearly authorised and appointed the plaintiff, '... Araman Jaya Sdn Bhd to develop and manage the Project for privatisation of a Wholesale Market and Cinema at Bandar Seri Kembangan, Selangor Darul Ehsan subject to the terms and conditions as stated in the agreement'. The same resolution authorised the appointment of the defendant's director, Tengku Putri Arafiah Ibni Sultan Salahuddin Abdul Aziz Shah and Mazlin bin Aris respectively as the plaintiff's director and alternate director in the plaintiff's company. The plaintiff through their company resolution similarly dated 16 March 1993 at exhs P3 and P38 accepted the contract from the defendant to develop and manage the project in question. The plaintiff further agreed to the appointment of Tengku Putri as the plaintiff's director and shareholder where in consideration of the plaintiff's appointment to the project, Tengku Putri was to be paid a sum of 20% of the plaintiff's nett profit from the said project.

[11] Based on the clear content of the parties' resolutions and having considered the background and surrounding circumstances against which the resolutions were passed, I find that the parties had intended to create a legal relation in anticipation of an award of a financially rewarding privatised project

from the Selangor State Government to the defendant. Therefore, for all intent and purpose, the resolutions that were clearly supported by consideration and were simultaneously passed by both parties on 16 March 1993 were legally binding and enforceable against the defendant.

[12] In this regard, the plaintiff's managing director, PW1 gave evidence that the resolutions were prepared by PW5, was signed sometime in March 1993 and was dated 16 March 1993 by his staff, PW2. PW5, the plaintiff's company secretary confirmed in court that he had prepared the resolution on the instruction of the defendant's authorised representative, Mazlin bin Aris who, pursuant to P2 and P37 was appointed an alternate director of Tengku Putri. He confirmed that at the time of the passing of the resolution, there were only two directors in the plaintiff's company, namely the plaintiff's managing director, PW1 and his wife, PW6. He further confirmed that the defendant's resolution in P3 and P38 was signed by the director, Tengku Putri and the defendant's shareholder, Amnah bt Hamzah, whilst the plaintiff's resolution in P2 and P37 was signed by the directors of the plaintiff's company namely PW1, PW6 and the defendant's director, Tengku Putri.

[13] Further, it was the unchallenged evidence of the plaintiff's witnesses, that prior to the passing of both the director's resolutions, the plaintiff's and the defendant's directors held a prepatory meeting at Park Royal Hotel in 1993 to discuss the said privatised project which was attended by PW1, PW5, the defendant's directors Tengku Putri and Mazlin bin Aris, and the defendant's shareholder, Amnah bt Hamzah. Both PW1 and PW5 confirmed that the meeting was held to discuss the project and that during the meeting, the plaintiff had agreed to pay both Tengku Putri and Mazlin bin Aris a monthly salary of RM5,000 as directors' emolument. PW5 further confirmed that at the meeting, the defendant's director, Tengku Putri had 'directed' plaintiff's managing director, PW1 to deal and discuss all matters relating to the implementation of the privatised project with the defendant's authorised representative, Mazlin bin Aris.

[14] In this regard, based on the company search in exh P4, Mazlin bin Aris was appointed as the defendant's director on 14 April 1995, the appointment date of which significantly coincide with the period in which both parties were actively involved in the prepatory works for the said privatised project. Prior to his appointment as the defendant's director, Mazlin bin Aris was Tengku Putri's alternate director as was stated in the defendant's resolution and based on the instruction of Tengku Putri, was the defendant's authorised representative for matters relating to the privatised project. PW1 gave evidence that he had prepared the working project paper and proposal for the privatisation project with Mazlin bin Aris which was submitted to the Petaling District Council in exh P1 and the Selangor State Government in exh P5. Based on para 2(b) of

exhs P6 and P7, P40, respectively dated 28 February 1995, 18 May 1995 and 7 August 1995, it was clear that the State Government had approved the said privatised project to the defendant for a concession period of thirty years subject to the terms as stated in appendix A of exh P7.

[15] In accordance with s 103 of the Evidence Act 1950, it is an established legal principle that a person who alleges must prove the allegation and the onus is on the other party to discharge the proof. In this regard, the defendant failed in cross examination to challenge and rebut the plaintiff's assertion and had failed to produce vital witnesses for their defence namely, the defendant's authorised representative, Mazlin bin Aris and the defendant's director, Tengku Putri. It is incumbent on the defendant to produce these crucial witnesses to support the defendant's contention that pending the formal execution of an agreement, parties had never intended to be bound by the terms of their respective director's resolutions. Section 114(g) of the Evidence Act 1950 provides:

> Court may presume
>
> (g) that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it.

[16] Section 114(g) of the Evidence Act 1950 only applies to material and important witnesses. The defendant's directors were clearly important witnesses for the defendant to disprove the plaintiff's case and it is therefore, incumbent on the defendant to produce these witnesses to challenge and dispute the plaintiff's testimony and not hope for the plaintiff to do so. In the case of *Chu Kim Sing & Anor v Abd Razak bin Amin* [1999] 6 MLJ 433; [1999] 4 AMR 4198, Malik Ishak J, held:

> ... the respondent's testimony was not challenged or disputed in cross-examination, and the rule is that, wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all.

[17] The defendant's failure to dispute the plaintiff's assertion during the cross examination of the plaintiff's witnesses and the defendant's failure to secure the attendance of their vital witnesses without reason and without any apparent effort, was found to be fatal to their case and for this reason, the adverse inference under s 114(g) of the Evidence Act 1950 is invoked against the defendant.

Issue 2

Whether the plaintiff have proven their claim of RM3,842,109.45 being expenditure and costs incurred for the privatised project of the defendant.

[18] It is the court's finding that the plaintiff have duly proven their claim

against the defendant that in developing and managing the said privatised project for the defendant, the plaintiff have incurred expenditure and costs including payment of professional consultancy fees, remuneration to the defendant's directors, office rental, renovation costs and purchase of two luxury cars for the use of the defendant's two directors. From the oral testimony of the plaintiff's witnesses and documentary evidence adduced in court, the plaintiff was proved to have engaged and appointed consulting engineers, architects, planners, geologist and other professionals for the purpose of the said privatised project. According to PW1, although the proposal in exh P5 was stated as had been prepared by the defendant, the technical drawings attached to the proposal were effectively prepared by the consulting architect who was appointed by the plaintiff for the project, namely Lak Akitek Sdn Bhd.

[19] PW3, a partner in the consulting architect firm, had confirmed in court that his architectural firm, Akitek Suria was appointed by the plaintiff as a consulting architect for the said privatised project. The appointment of Akitek Suria by the plaintiff as a consulting architect for the project was evident in the minutes of the prepatory meetings that were regularly held for the said privatised development project. According to PW3, his firm had completed 45% of the total professional architectural works for the project and that the architectural plans and drawings that his firm had prepared were attached as annexure to the privatisation development agreement dated 8 November 1997. PW3 confirmed that his firm was engaged by PW1 to be one of the consulting architect in the privatisation project in Seri Kembangan where the firm had prepared the required drawings for submission to the Selangor State Government. PW3 further confirmed that the computation of the firm's fees was based on 3% of the estimated value of work and that although his firm had completed 45% of the professional architectural works at the material time, no payment was received from the plaintiff.

[20] According to PW3, PW1 had informed him that the plaintiff was unable to pay his architectural firm due to the defendant's refusal to appoint the plaintiff for the project which had caused huge monetary losses to the plaintiff. In this regard, the defendant had clearly failed to disprove the plaintiff's clear assertion that Akitek Suria was appointed by the plaintiff specifically for the project, that the firm had executed and prepared the necessary architectural drawings and plans required for the project approval, and that the appointment and involvement of Akitek Suria and other consultants for the project during the extensive prepatory meetings were within the knowledge and consent of the defendant.

[21] PW4, a former project manager for Jurutera Konsult Maju Sdn Bhd had further confirmed in court that his engineering consulting firm was appointed by the plaintiff as one of the consulting engineers and project manager for the

privatised project of the defendant. PW4 gave evidence of the numerous prepatory meetings that were held at the plaintiff's office to discuss the 'said privatised project' which were attended by representatives of both parties including PW1, PW3, PW4, the defendant's director, Mazlin bin Aris and the consultants appointed for the project.

[22] PW4 had confirmed in court that his firm had prepared the survey plans, drawings and had executed investigative survey and other prepatory works for the said privatised project which were undertaken from 1993, 1994 and 1995. PW4 gave detailed testimony of the prepatory survey works which include the preparation of plan and drawings on the relocation of the squatters affected by the privatised project. PW4 further testified that the computation of his firm's professional fees was based on 3% of the mechanical and engineering, civil and structural works and that although his firm had completed 50% of the total works, the firm have not received from the plaintiff any of the firm's professional fee amounting to RM1,140,707.50. According to PW4, he was informed by PW1 that the plaintiff was unable to pay their professional fees due to the defendant's failure to honour the agreement to appoint the plaintiff to the project. PW4, who was responsible for the preparation of the minutes of the prepatory meetings in question, confirmed that the minutes that he had prepared were sent for verification to the consultants involved in the project and the defendant's director, Mazlin bin Aris.

[23] The appointment and involvement of other professionals in the prepatory works for the privatised project was also evident in the documents produced in court which included the quotation for the planning fees of ANZ Planners and the soil test fee by Jurukur Cekap Sdn Bhd PW1 and PW4 gave evidence of 32 official meetings that were regularly held between representatives of both parties and the consultants appointed for the project for the period spanning from early 1996 to mid 1997 to discuss the project as in exh P8. The meetings were attended by PW1, PW3, PW4 and PW5 and the defendant's director, Mazlin bin Aris at the plaintiff's office in Ampang. According to PW4 the drawings, reports, and plans that were prepared by the appointed consultants pursuant to these prepatory meetings, were submitted for the consideration and approval of the State Government.

[24] In this respect, the court took judicial cognizance of a letter from the Selangor State Secretary dated 28 February 1995, exh P6 which clearly awarded and appointed the defendant to develop the said privatised project. The subsequent privatisation development agreement dated 8 November 1997 which was eventually executed between the Selangor State Government and the defendant confirmed the plaintiff's claim that despite the defendant being

awarded the privatised project from the Selangor State Government, the defendant have failed and refused to appoint the plaintiff to the project.

[25] Apart from the payment of professional fees to the consultants involved in the privatised project, in developing and managing the privatised project for the defendant, the plaintiff had incurred other related expenses which included the payment of monthly directors fees of RM5,000 to the defendant's directors, Tengku Putri and Mazlin bin Aris totaling RM590,000. These monthly payment of RM10,000 were paid to the defendant's directors by the plaintiff for a considerably long period from February 1992 until January 1998 which were supported by the payment vouchers that were made out to the defendant's directors in exhs P20, P21, P22, P23, P24, P25 and P26. These payment vouchers consistently bore similar description bearing the words, '... pay to Tengku Mazlin bin Aris, dollars five thousand only being director's fees (salary or allowance) for the month... received by Tengku Mazlin bin Aris on behalf of Tengku Putri Arafiah binti Sultan Salahuddin Abdul Aziz …'. The plaintiff's managing director, PW1 gave clear unrebutted evidence of monthly payment made to the defendant's directors through Mazlin bin Aris and his testimony was supported by the considerable number of payment vouchers that were issued by the plaintiff to the defendant for the period from February 1992 to January 1998.

[26] PW1's evidence of the regular monthly payment of directors' allowances paid to the defendant's directors was further corroborated by the evidence of PW2, PW5 and PW6. PW6 gave evidence that she was informed by PW1 of the plaintiff's commitment to pay fix monthly payment of RM5,000 to Tengku Putri and RM5,000 to Mazlin bin Aris for the said project. The plaintiff's ex-employee PW2 who was responsible for the preparation and issuance of payment vouchers to the defendant's directors, confirmed that on PW1's instruction she had prepared monthly payment vouchers to the defendant's directors, Tengku Putri and Mazlin bin Aris, on the instruction of PW1.

[27] Although the plaintiff's payment vouchers did not bear the letterhead of the plaintiff company, but that of Bina Satu Sdn Bhd, the court accepted PW2's evidence that Bina Satu Sdn Bhd was essentially, the plaintiff's managing director's company which was incorporated in mid 1992 and that, the plaintiff shared the same office with Bina Satu during it's early commencement. As the plaintiff did not have its own payment voucher, PW2 was directed by PW1 to use Bina Satu Sdn Bhd's voucher to effect the monetary payment to the defendant's directors, hence the usage of Bina Satu's payment vouchers in all of the plaintiff's payment to the defendant's directors. The plaintiff's company secretary PW5, confirmed in court that he had regularly accompanied PW1 to the monthly meetings that were held for the project. At

these meetings, payment was made by PW1 to Mazlin bin Aris the amount of which he could not confirm but that it exceeded five hundred thousand ringgit. PW5 further confirmed that there were occasions where the plaintiff made payment of substantial sum to the defendant upon request by Mazlin bin Aris, purportedly for the purpose of the project. Both PW1 and PW5 confirmed that the plaintiff's payment to the defendant were made through the defendant's authorised representative, Mazlin bin Aris on the instruction and with the knowledge and consent of the defendant's director, Tengku Putri.

[28] Apart from these monthly directors fees, PW1 gave evidence of other payment made to the defendant through Mazlin bin Aris, purportedly to settle matters relating to the project amounting respectively RM90,000, RM100,000, RM200,000 and RM100,000 as exhibited in the plaintiff's payment vouchers in exhs P15, P16, P17 and P18. PW1 however admitted that he had no knowledge of the purpose for which payment was required of him by Mazlin bin Aris as according to PW1, the meetings with the Selangor State Government were attended by the defendant's representative. Evidence of the substantial payment that were made by the plaintiff to Mazlin bin Aris was corroborated by PW5, who accompanied PW1 during the meetings when payment were made to Mazlin bin Aris. According to PW5, as the payment involved substantial amount, PW5 had to wait for a considerable period as enable Mazlin bin Aris to count the money before he signed the plaintiff's payment vouchers. In the absence of rebuttal evidence by the defendant to disprove these clear oral testimony and documentary evidence of the plaintiff's witnesses, the court accepted the plaintiff's assertion of considerable cost and expenses that were incurred by the plaintiff for the purpose of the said privatised project that was subsequently awarded to the defendant.

[29] In preparation of the said privatised project, the plaintiff had also incurred other expenditure in the purchase of two luxury cars namely a Mercedes Benz 300 SLA registration No WDU 1233 costing RM283,514, and a BMW 318(A) bearing registration No BDW 6176 costing RM160,789 as evident in the receipts in exhs P30 and P31. According to PW1, the defendant requested that the plaintiff provided the cars to their directors for the use of the said privatised project where the handing over of the cars were witnessed by PW5. The cars were subsequently returned to the plaintiff on 24 September 1998 by the defendant's director, Mazlin bin Aris where PW6 acknowledged the receipt of both cars in a letter in exh P35.

THE DEFENDANT'S CONTENTION

[30] The defendant had contended that the parties' resolutions in exhs P2, P3, P37 and P38 were vague and that the project that was awarded to the defendant by the Selangor State Government were materially different from

the project that was agreed to by the parties in the resolutions. The defendant further contended that the parties' company resolutions were not intended to be legally binding and that the resolutions merely contained terms as basis for the negotiation of another (privatisation) agreement. In this regard, the court took notice that exh P5 was an approval that was made in respect of a proposed housing development project on Lot 2829, Kg Aman, Seri Kembangan, Selangor. Pursuant to the approval letter by the Selangor State Government dated 28 February 1995 to award the privatised project to the defendant, the project was further expanded which resulted in changes to the description and size of the project as exhibited in the approval letter by Petaling District Council dated 18 May 1997 exhs P7 and P40. In any event, the project that was the subject matter of the parties' company resolutions at P2, P3, P37 and P38 was generally described as 'Project For Privatisation of Wholesale Market and Cinema at Bandar Seri Kembangan, Selangor …' whilst the approval letters from the Petaling District Council in P6, P7 and P40 were similarly described, namely '... a wholesale market and commercial complex comprising of … a cinema … '. Again, the defendant failed to adduce evidence nor produce material witness to explain and support their contention of purported 'material difference' between the privatised project that was referred to in the parties' resolutions from that which was awarded to the defendant by the State Government in the privatisation agreement dated 8 November 1997. Thus, in the absence of rebuttal evidence from the defendant, the court is of the view that the privatised project that was approved and awarded by the Selangor State Government to the defendant was in respect of the same privatised project as was referred in both the plaintiff's and the defendant's company resolutions at P2, P3, P37 and P38.

[31] As to the defendant's contention that the agreed resolutions were subjected to the execution of a further formal contract between parties, based on both the parties conduct and the circumstances surrounding the parties resolutions, the court is of the view that both parties had intended to create a legal relation and execute a legally binding agreement for the purpose of the project. The defendant failed to secure the attendance of their directors to give evidence in court. No proof of attempt that was made for the witnesses to be located, particularly Tengku Putri and Mazlin bin Aris to rebut the plaintiff's case does not shift the burden to the plaintiff to produce these witnesses. Pursuant to s 103 of the Evidence Act 1950, the onus is clearly on the defendant and not the plaintiff, to produce the defendant's directors, Tengku Putri, Mazlin bin Aris or the defendant's solicitor, Mr Palaya. Mr Palaya who allegedly attended a meeting with PW1, PW5, PW6, DW1 and the defendant's director, Tengku Putri where payment of compensation to the plaintiff, was discussed. There is clearly no legal obligation for the plaintiff to produce these vital witnesses and that in failing to produce these witnesses, the defendant failed to rebut the plaintiff's assertion of the defendant's clear breach of the resolutions in question.

[32] Further, it was also clear to the court that the defendant's sole witness, DW1 was not involved nor possessed any material knowledge of the parties earlier understanding in 1993 for the plaintiff to develop the privatised project for the defendant. DW1 only became involved with the defendant upon his purchase of Mazlin bin Aris's shares on 19 April 1999 for a sum of RM3m. DW1 conceded in court that he had paid RM150,000 to PW1 for the purpose of assisting PW1's daughter's education in Australia. However, DW1's voluntariness and readiness in providing monetary assistance to the plaintiff's managing director remained speculative. In the light of clear oral testimony from the plaintiff's witnesses that payment of RM150,000 was made by DW1 to the plaintiff for the costs incurred for the said project, DW1's 'generosity' in advancing RM150,000 for PW1's daughter's education appear to be self-serving and actuated by other ulterior motive.

[33] The police report lodged by the Tengku Putri against Mazlin bin Aris on the ground that Mazlin bin Aris had unlawfully used her name to collect money from the plaintiff is an apparent afterthought and self serving. In this regard, in the light of the overwhelming evidence pointing to her involvement, I find that the lodgement of the police report by Tengku Putri against Mazlin bin Aris, dubious and questionable. The police report that was lodged by Tengku Putri appear to support the plaintiff's claim that the payment made by the plaintiff for the project was with the knowledge of the defendant's director, Tengku Putri. Mazlin bin Aris was clearly the defendant's authorised representative for the purpose of the project and was appointed the alternative director for the defendant's director, Tengku Putri pursuant to the plaintiff's resolution in P2. Mazlin bin Aris was significantly appointed the defendant's director on 19 April 1995 as exhibited in P4 and was the defendant's largest shareholder. The police report of the defendant's Tengku Putri does not exculpate the defendant's clear liability to the plaintiff in the light of clear oral testimony from the plaintiff's six witnesses and the unrebutted documentary evidence adduced before this court.

[34] Based on the above, it was clear that the plaintiff in anticipation of the defendant being awarded the privatised project by the Selangor State Government, had initiated and executed prepatory works for the privatised project for the defendant in which considerable expenses were incurred by the plaintiff in the course of the development of the said privatised project. The evidence adduced in its entirety, proved that the defendant's had breached the parties understanding which had occasioned severe financial losses to the plaintiff. The court accordingly allowed plaintiff's claim prayed in paras 10(b), (c), (d) in the amount of RM2.5m with interest and cost.

[35] As regard to the amount of damages an amount of RM2.5m is awarded to the plaintiff which the court considered as a fair and reasonable amount in

the light of documentary and oral testimony of the witnesses. Apart from PW3 and PW4, not all of the consulting professionals engaged by the plaintiff for the project were called to give evidence to support and explain the computation of the expenses including ID33A, ID33D and ID33E which remained unproved nor was the purported renovation costs of the office space explained in court. As for the plaintiff's claim for the purchase of two 'luxury' cars for the use of the defendant's directors no evidence of the estimated market value of these cars adduced before the court. Further, the tenancy agreement in respect of rental charges incurred by Bina Satu Sdn Bhd for the said project was not tendered in court to support the plaintiff's claim. In computing and ascertaining the amount to be awarded to the plaintiff, the sum of RM2.5m was not manifestly excessive, and is considered a reasonable and fair amount.

[36] Therefore having considered the evidence in its entirety and the submission of both parties, judgement is accordingly entered for the plaintiff in the sum of RM2.5m as per prayer 10 of the writ of summons. The plaintiff is further granted interest at the rate of 8%pa on the said sum from the date of the writ of summons until the date of full realisation and costs.

Plaintiff's claim allowed with costs.

Reported by Kohila Nesan